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# PROSECUTOR'S BRIEF

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## A Toolkit for Unavailable Witnesses

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# Penal Code Section 1172.1 and Capital Cases: *An Analysis*

*by Ron Matthias and Dolores Carr*

Penal Code section 1172.1(a)(1) authorizes courts to "recall the sentence and commitment previously ordered and re-sentence [a] defendant in the same manner as if they had not previously been sentenced." The statute does not mention capital cases or otherwise address how, if at all, its provisions might be applied to capital cases.

This article examines the following questions:

1. Is section 1172.1 applicable to capital cases?
2. If section 1172.1 is applicable in capital cases, can it be applied to convert a death sentence to a sentence of life imprisonment without the possibility of parole (LWOP)?
3. If section 1172.1 allows death-to-LWOP conversions, what factors and considerations must a court weigh when deciding whether to convert a death sentence to LWOP?

## Overview

### *Section 1172.1's "Who" and "When" Are Straightforward*

Pursuant to section 1172.1(a)(1), the court (i.e., "the original sentencing judge,

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a judge designated by the presiding judge, or any judge with jurisdiction in the case") may recall and resentence

> on its own motion, within 120 days of the date of commitment or at any time if the applicable sentencing laws at the time of original sentencing are subsequently changed by new statutory authority or case law at any time upon the recommendation of the secretary [of the California Department of Corrections and Rehabilitation] or the Board of Parole Hearings in the case of a defendant incarcerated in state prison, the county correctional administrator in the case of a defendant incarcerated in county jail, the district attorney of the county in which the defendant was sentenced, or the Attorney General if the Department of Justice originally prosecuted the case.

### *The "What" Is Also Clear*

Under section 1172.1(a)(3), when resentencing, the court may either:

> (A) Reduce a defendant's term of imprisonment by modifying the sentence.
>
> (B) Vacate the defendant's conviction and impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that offense was charged in the original pleading, with the concurrence of the defendant, and then resentence the defendant to a reduced term of imprisonment.

In either case, the new sentence can be "no greater than the initial sentence" pursuant to section 1172(a)(1).

### *The "How" Is Obscured by Confused and Conflicting Language*

On the one hand, section 1172.1(a)(1) directs the court to "resentence the defendant in the same manner as if they had not previously been sentenced," "apply the sentencing rules of the Judicial Council" [§ 1172.1(a)(2)], "provide an opportunity for the victim to be heard" [§ 1172.1(a)(8)(B)], strive "to eliminate disparity of sentences and to promote uniformity of sentencing" [§ 1172.1(a)(2)], and above all, act in the interest of justice.

On the other hand, section 1172.1(a)(5) directs the court to conduct an interest-of-justice inquiry that seemingly focuses singularly on whether "continued incarceration is no longer

in the interest of justice" by reference to a non-exclusive list of "postconviction factors." These factors include "whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence." In addition, section 1172.1(b)(2) purports, in cases when the request for re-sentencing is made by any of several specified executive officers, to create

> a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant currently poses an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18.

### Section 1172.1 Has No Application to Capital Cases

As noted, section 1172.1 offers the court two dispositional options: It may either reduce the defendant's term of imprisonment or vacate the defendant's conviction and impose judgment on a lesser offense.

Because a death sentence is not a "term of imprisonment," it is not subject to reduction under subdivision (a)(3)(A).[1] Nor, of course, is a death sentence a "conviction," so it is equally not subject to vacatur under subdivision (a)(3)(B).[2] There being no ambiguity, it must be presumed that "lawmakers meant what they said, and the plain meaning of the language governs."[3] Accordingly, section 1172.1 has no application to death sentences.

To be sure, section 1172.1 was among several existing statutory provisions renumbered and relocated by AB 200 in 2022. As the Legislative Counsel's *Digest* then observed, if a bit cryptically:

> Existing law provides various authorities for the resentencing of persons convicted of crimes including persons convicted of crimes, or enhancements that have been subsequently repealed or reclassified.
>
> By virtue of the location in code where these provisions have been codified, the application of these provisions to certain individuals, including those sentenced to death or imprisonment for life, is prohibited or ambiguous.
>
> This bill would renumber these provisions and place them in a new article, thereby making certain provisions that exclude certain persons from their use inapplicable to these renumbered provisions.[4]

Indeed, before AB 200 was enacted, section 1170.03—the predecessor version of section 1172.1—was in article 1 of chapter 4.5.[5] Section 1170(a)(3), still located in article 1, states: "Nothing in this article shall affect any provision of law that imposes the death penalty." AB 200 created a new article, 1.5, into which it moved five existing provisions, including what is now section 1172.1. The text of former section 1170.03 and new section 1172.1, however, is identical.

Renumbering section 1170.03 as section 1172.1 and removing it from article 1 certainly made "inapplicable" (as the *Digest* put it) the "exclusion" (as the *Digest* also put it) of capital cases achieved earlier by language found in section 1170(a)(3). But those changes alone did not achieve the "inclusion" of capital cases within the reach of section 1172.1. There is no canon of statutory construction capable of such heavy lifting, and if there were, it would carry no force in the face of retained language, such as that appearing in subdivision (a)(3)(A), which expressly achieves "exclusion" of death sentences by limiting the reach of sentence-reduction to terms of imprisonment. The Legislative Counsel never stated anything to the contrary, and it most certainly never proclaimed that section 1172.1 applied to capital cases. Unsurprisingly, the courts agree that "'[t]he Legislature … renumbered section 1170.03 to section 1172.1, but made no substantive changes.'"[6]

Any actual intent to bring capital sentences within the reach of section 1172.1 could have been easily done by amending the operative language in subdivision (a)(3)(B) from "[r]educe a defendant's term of imprisonment …" to "[r]educe a defendant's sentence …."[7] The Legislature's failure to do so speaks far more loudly about its intent than anything one might hope to glean by convoluted inference from its renumbering and reshuffling an existing statute while leaving its text unchanged. After all, "the principle of Occam's razor—that the simplest of competing theories should be preferred over more complex and subtle ones—is as valid juridically as it is scientifically.'"[8]

In all events, as the California Supreme Court has explained, "[w]hen interpreting statutes, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law. … *This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed*.'"[9]

## Section 1172.1 Does Not Authorize Converting a Special-Circumstance Murderer's Death Sentence to LWOP

Although a death sentence itself can be neither reduced nor vacated under section 1172.1, a court could vacate a defendant's underlying conviction for special-circumstance murder and impose judgment on a lesser-related or included offense. But any such order would offer no path to re-sentencing the defendant to LWOP because there is no lesser-related or included offense of special-circumstance murder for which LWOP is a prescribed punishment.[10]

More fundamentally, the imposition of LWOP sentences would actually defeat section 1172.1's efforts to target cases in which "continued incarceration is no longer in the interest of justice" and to remediate that condition by replacing long prison terms with shorter periods of confinement. LWOP, of course, entails as much if not more "continued incarceration" as a death sentence. This simple fact further demonstrates that section 1172.1 would be the roundest of pegs to the square hole of death penalty cases—which would itself explain why the measure is not applicable to death sentences: Section 1172.1 is explicitly directed at shortening the length of existing terms of confinement; it simply cannot, consistent with the Legislature's purpose, be twisted into service as a device for converting death sentences to sentences of lifelong imprisonment.[11]

## The "Circumstances of the Crime" and "Any Special Circumstance" Remain Pertinent Under Section 1172.1

### *Courts Must Still Consider Them Before Resentencing*

"[S]tatutory language must … be construed in the context of the statute as a whole and the overall statutory scheme."[12] "Each word and phrase should be given effect, and none should be construed to render the others superfluous."[13]

"[S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible."[14] "[I]nterpretations that lead to absurd results … are to be avoided,"[15] as are any interpretations that would raise doubts about the statute's constitutional validity.[16]

Applying these principles yields only one conclusion: The Legislature did not intend that re-sentencing hearings be conducted as "clean slate" proceedings in which the sole criteria bearing on the court's ruling are those "postconviction factors" that "may" be considered under subdivision (a)(4), including "whether age, time

served, and diminished physical condition, if any, have reduced the defendant's risk for future violence." Rather, and notwithstanding the presumption expressed in subdivision (b)(2), all of the "circumstances of the crime" (among other factors, both aggravating and mitigating) necessarily remain not only salient, but powerfully relevant to the proper disposition of any petition for reduction of sentence brought under section 1172.1.

### *Subdivision (a)(1): Sentencing Like It Is the First Time*

Even assuming that death sentences are not categorically ineligible for conversion to LWOP, section 1172.1(a)(1) requires that any resentencing in a capital case still proceed "*in the same manner as if [the prisoner] has not previously been sentenced*." [Emphasis added.] Accordingly, the "circumstances" of a capital crime and "any special circumstance" retain their central importance, as a court must still "consider, take into account, and be guided by" them. A court must also still determine "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented," and that determination must still inform any section 1172.1 ruling in a capital case.

Put differently, any request made under section 1172.1 to modify a capital sentence will, if it is not rejected outright, return the case to its status quo ante posture (i.e., that which existed before any earlier sentence was initially pronounced), thus triggering the provisions of section 190.4(e):

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by *the aggravating and mitigating circumstances referred to in Section 190.3*, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. [Emphasis added.]

In turn, "the aggravating and mitigating circumstances referred to in Section 190.3" include:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Thus, there is no plausible reading of section 1172.1 under which a court could reduce a death sentence in disregard of the circumstances of the crime and its consequences. To the contrary, the court must consider those matters, and must further

> *reweigh independently* the evidence of aggravating and mitigating circumstances and then determine whether, in its *independent judgment*, the weight of the evidence supports the jury's verdict.[17]

### *Subdivision (a)(2): Applying the Sentencing Rules of the Judicial Council*

Wholly apart from the requirement effectively imposed by subdivision (a)(1) that section 1172.1 be read in pari materia with section 190.4(e) (and, by incorporation, section 190.3(a) through (k)), a court's consideration of circumstances of the underlying crime is compelled by subdivision (a)(2)'s command that a resentencing court "apply the sentencing rules of the Judicial Council."

Among the Judicial Council's sentencing rules are California Rules of Court, rule 4.421, subdivision (a) [factors relating to the crime] and subdivision (b) [factors relating to the defendant] that list "circumstance in aggravation," as follows:

> (a) Factors relating to the crime, whether or not charged or chargeable as enhancements include that:
>
> (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;
>
> (2) The defendant was armed with or used a weapon at the time of the commission of the crime;
>
> (3) The victim was particularly vulnerable;

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;

(5) The defendant induced a minor to commit or assist in the commission of the crime;

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

(9) The crime involved an attempted or actual taking or damage of great monetary value;

(10) The crime involved a large quantity of contraband; and

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(12) The crime constitutes a hate crime under section 422.55 and:

(A) No hate crime enhancements under section 422.75 are imposed; and

(B) The crime is not subject to sentencing under section 1170.8.

(b) Factors relating to the defendant include that:

(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior term in prison or county jail under section 1170(h);

(4) The defendant was on probation, mandatory supervision, postrelease community supervision, or parole when the crime was committed; and

(5) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was unsatisfactory.

The directive in section 1172.1(a)(2) that the court "apply the sentencing rules of the Judicial Council" defeats any suggestion that section 1172.1 provides for a "clean slate" sentencing proceeding at which "postconviction factors" alone are determinative.

### *Rule 4.421, Subdivision(c): All Roads Lead to Section 190.4(e)*

Rule 4.421, subdivision (c) extends the definition of circumstances in aggravation to "[a]ny other factors *statutorily declared* to be circumstances in aggravation or that reasonably relate to the defendant or the circumstances under which the crime was committed." [Emphasis added.] That provision alone would require a resentencing court in the capital context to perform all the same tasks imposed by section 190.4(e) at initial sentencing in special-circumstance murder cases—and thereby forbids the court from hinging its ruling on any single factor, including its assessment of the defendant's current dangerousness.

### *Avoiding Absurd Results*

Because "age, time served, and diminished condition" will eventually reduce the risk of future violence in virtually every instance, treating diminished risk of danger to public safety as controlling would also lead to absurd results. Everyone's "condition" will diminish at some point, just as "age" progresses in only one direction. The same is true of any prisoner's accumulated "time served." Section 1172.1 simply cannot be read to authorize the eventual conversion of every death sentence to LWOP irrespective of the facts of the murder, the cruelty with which it was committed, or its lasting, shattering effects on the lives of the victim's surviving family members.

### *No Legislative Sleight of Hand*

Indeed, whatever the person's age or physical condition, a continuously incarcerated prisoner will, of course, always pose less danger to the public than one who is released from custody; that difference being the main justification for separating dangerous criminals from the rest of society in the first place. It is

equally axiomatic that the legal cause of a prisoner's continuous confinement has no effect on the danger the prisoner poses to those beyond the prison's wall: Quite clearly, as long as the prisoner remains confined, death-sentenced inmates imprisoned while awaiting execution pose no different level of threat to the general public than that posed by those sentenced to LWOP.

Of course, because the threat a prisoner poses to those inside the prison is also the same whether the inmate is serving LWOP or awaiting execution, it would make no sense for a court to say, in effect, "Although the prisoner continues to pose a risk to people inside the prison, I'll reduce his death sentence to LWOP because doing so will still keep people outside the prison protected from that risk."

The wording and entire structure of section 1172.1 make clear that its objective is reducing sentence length while its countervailing concern is protecting the public from prisoner-specific threats of danger. As explained, death-to-LWOP conversions do not serve (and might even defeat) the objective. Such conversions also would not alter a prisoner's threat to the safety of persons beyond prison walls. These circumstances more than explain why the only sentence reductions section 1172.1 contemplates are from one term of imprisonment to another term of shorter duration.

If "equal threat" were a valid basis for making death-to-LWOP reductions, it would apply to *every* condemned prisoner and would thereby convert *every* section 1172.1 proceeding initiated on a prosecutor's motion from an occasion requiring deliberative rule application by a thoughtful judge to one in which there could be only one predetermined outcome.

Far worse, elevating the "equal threat" precept to determinative effect would flagrantly countermand the electorate's judgment that LWOP is *not* "just as good" as the death penalty in all respects. For example, it is both reasonable—and, more importantly, fully within the electorate's prerogative—to conclude that death sentences provide more general deterrence than do lesser sentences. By enacting section 1172.1, the Legislature manifestly did not seek to repeal capital punishment by subterfuge, and the statute cannot be construed as though it had.

"Assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and *in determining the appropriate punishment*."[18] Californians have enshrined that principle in Marsy's Law, a provision of the California Constitution that grants crime victims specific rights, including the right "to be heard" at sentencing hearings.[19]

Cross-referencing Marsy's Law, section 1172.1(a)(8)(B) provides:

> [I]f a victim of a crime wishes to be heard pursuant to the provisions of Section 28 of Article I of the California Constitution, or pursuant to any other provision of law applicable to the hearing, the victim shall notify the prosecution of their request to be heard within 15 days of being notified that resentencing is being sought and the court shall provide an opportunity for the victim to be heard.

The devastating impact on the victims' survivors is the most enduring consequence of murder. And because the impact on the victim's family flows from the crime itself, surviving family members who exercise their rights under Marsy's Law will most naturally seek "to be heard" on the traumatization they have suffered. Indeed, they would not likely be able to speak with authority on much else, including whether "the defendant currently poses an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18."

Section 1172.1's express acknowledgment of victims' rights cannot be construed as an idle gesture.

> It would be difficult to conceive of a more absurd result than to adopt a construction which would prevent a victim or next of kin from having a meaningful opportunity to protest a plea bargain [or disposition by any other means] that will allow a defendant to escape the punishment which the victim or next of kin feels is appropriate to the crime, [as such a construction] would reduce the victim's statement to "an arid ritual of meaningless form."[20]

The Legislature's recognition of victims' rights cannot be reconciled with any conclusion but this: The circumstances of the offender's crime, including its effects on surviving family members, must be considered on re-sentencing. Section 1172.1(a)(8)(B) and the state constitution deny courts license to act otherwise.

### *The Interest of Justice*

Properly construed, section 1172.1 creates at most a limited opportunity for sentence reduction, the propriety of which must be determined within the context of the applicable sentencing framework prescribed by law—albeit freshly informed by additional postconviction considerations that were necessarily unknowable to the court at the time of initial sentencing. And even then, no modification can be made unless the court finds that such a ruling is compelled by "the interest of justice."[21]

Assessing what is in the interest of justice is an exquisitely judicial undertaking. The parameters of this standard are not statutorily defined, but case law sets out some guidelines. Most useful to that end are cases construing section 1385, which authorizes dismissals "in furtherance of justice."

*Wheeler v. Superior Court* teaches that "in furtherance of justice" and "in the interest of justice" are equivalent standards.[22] Accordingly, under section 1385 and section 1172.1 alike, "[t]he basic ground involved, furtherance of justice, is the same whether the court acts on motion of the prosecution or its own motion."[23] And, again borrowing from section 1385 cases, we know that the basis for rulings made under either provision "must be 'that which would motivate a reasonable judge.'"[24]

Although a court's authority in that realm is not limitless, concern for the separation of powers constrains the authority of both the legislative and executive branches to unduly curtail the judiciary's power. Apropos of section 1172.1, it seems clear that the Legislature lacks power to confine a court's interest-of-justice evaluation to, in effect, a single factor—whether "the defendant currently poses an unreasonable risk of danger to public safety"—simply because the request to reduce a defendant's sentence came from a prosecutor or some other executive official. For this and other reasons, the "presumption" purportedly created by section 1172.1(b)(2) must be construed narrowly, i.e., in a manner that does not broadly impinge on traditional judicial discretion, nullify the force of the statute's other specific commands, or raise doubts about its own constitutionality or that of the state's death penalty scheme under the Eighth Amendment.[25]

By the same token, the judiciary itself has acknowledged limits on the discretion of lower courts. As the California Supreme Court explained in *Wheeler*,

> In our attempt to render section 1385's in-furtherance-of-justice requirement "more determinate," we have interpreted the term "justice" to refer to the justice 'within' or "intrinsic" to the legal "scheme to which the defendant is subject." To look outside the scheme would more greatly risk elevating idiosyncratic views of justice above the duly enacted laws of our chosen representatives.[26]

As explained, the "legal scheme" for resolving a request to reduce a death sentence under section 1172.1 would include (1) section 190.4(e), (2) rule 4.421, and (3) Marsy's Law.

The need recognized in *Wheeler* to avoid elevating "idiosyncratic views of justice"[27] is at least as great in the section 1172.1 context as it is under section 1385. And that need is especially urgent in the face of any views that clash directly with the electorate's determination that LWOP and death sentences are not equally effective means of enhancing or ensuring public safety. Put differently, the "equal threat" notion is *not* a ground that "would motivate a reasonable judge"[28] to reduce a condemned prisoner's sentence.[29] "'Furtherance of justice' … requires consideration of the constitutional rights of the defendant and the interests of society."[30]

### *Sentencing Disparity and 'Disuniformity'*

Among the objectives section 1172.1(a)(2) was purportedly enacted to achieve are "eliminat[ing] disparity of sentences and . . . promot[ing] uniformity of sentencing."[31] Federal and state death penalty jurisprudence strives for the same, scrupulously observing the principle that capital punishment, while appropriate for the "worst of the worst" murderers, must be administered in a way that allows no role to chance, whimsy, caprice or any other arbitrary, random, or idiosyncratic force.[32]

A system that veers toward normalizing the haphazard imposition—or removal—of death sentences for reasons wholly unrelated to the heinousness of the crime and moral culpability of the offender will soon find its constitutional validity cast into doubt. That is so because a court would assuredly create, not reduce, systemic sentencing disparity and disuniformity if it blinds itself to the heinousness of particular murders and instead focuses singularly on the murderer's risk for future violence years or even decades later.

## Conclusion

Section 1172.1 has no application to capital cases, but even if it did, it would not permit converting death sentences to LWOP. In all events, because a re-sentencing court must proceed "in the same manner as if [the defendant] had not previously been sentenced" and "apply the sentencing rules of the Judicial Council," a request to modify a death sentence cannot singularly turn on the murderer's risk for future violence. Rather, under section 190.3, the court must also review the evidence

> consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and ... make a determination whether a jury's findings that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

The court cannot be compelled to adhere to any alternative analytical framework that fails to observe and preserve that duty, and any provision, phrased as a presumption or otherwise, must be construed narrowly to avoid that forbidden consequence.

In the end, of course, no court can modify any sentence unless also convinced that doing so will actually serve the interest of justice—an inquiry that, as a matter of statutory construction and constitutional compulsion, can neither indulge the supposition, repeatedly rejected by the state's electorate, that LWOP sentences are "just as good" as death sentences at keeping the public safe nor ignore the pleas and enduring suffering of the families whose loved ones' lives were lost. ■

**ENDNOTES**

1. Pen. Code §§ 15, 17 (listing "death" as a punishment separate and distinct from "imprisonment," "fine"); see also e.g., Cal. Rules of Court, rule 4.420 (concerning selection of upper, middle, or lower terms).
2. See Law Dictionary and Encyclopedia (Wex), Legal Information Institute, Cornell Law School ["A conviction is an adjudication of a criminal defendant's guilt; specifically, it is the act or judicial process of finding a criminal defendant guilty of a charged offense."] <*https://www.law.cornell.edu/wex/conviction*> (accessed Mar. 17, 2025).
3. *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 736 ["Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive."].
4. <*https://tinyurl.com/4wn6tk8m*> (accessed Mar. 17, 2025).
5. Chapter 4.5 is in Part 2 of the Penal Code.

6. *People v. Braggs* (2022) 85 Cal.App.5th 809, 818, citing *People v. Salgado* (2022) 82 Cal.App.5th 376, 378, fn. 2; accord, *People v. Vaesau* (2023) 94 Cal.App.5th 132, 142, citing *Braggs, supra*. Likewise, other legislative materials characterize the changes achieved by AB 200's "renumbering of provisions and creating a new article" as "technical." Report of Senate Committee on Budget and Fiscal Review (hearing date June 27, 2022) p. 2 ["Includes technical changes that result in renumbering of provisions and creating a new article related to Penal Code 1170."] <*https://tinyurl.com/p5dv2ks4*>; accord, J. Richard Couzens, Recall of Sentence, Penal Code, § 1172.1 (2024), p. 4 ["Section 1170.03 was subsequently renumbered to section 1172.1 without substantive change."] <*https://tinyurl.com/2zmtsjpr*>. Not even leading criminal defense practice guides contend that AB 200 extended recall-and-resentence provisions to death penalty cases. See, e.g., Central California Appellate Program, News & Updates, AB 200 <*https://tinyurl.com/bd3ze8xd*>; Appellate Defenders, Inc., *Changes in the Law, Recent Changes: AB 200* <*https://tinyurl.com/3mb4vm35*> (accessed Mar. 17, 2025).
7. *Martinez v. Superior Court of Santa Clara County* (2024) 106 Cal.App.5th 461, 473 ["Had the Legislature intended to mandate dismissal of the charges that led to the original plea or prohibit refiling of those charges under section 1473.7, it could have included such language in the statute."].
8. *Brodie v. Workers' Compensation Appeals Board* (2007) 40 Cal.4th 1313, 1328, fn. 10.
9. *Jarrow Formulas*, *supra*, at 737 [emphasis added], quoting *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75. When "the Legislature … has already provided specific directions as to what a court *may* do," those directions cannot be "rewrit[ten]" "under the guise of construction." (*Martinez*, *supra*, at 473 [emphasis in original].)
10. Nor could a court circumvent the described limitation on its authority by vacating the special-circumstance murder conviction under subdivision (a)(3)(B), immediately reinstating the same conviction, and then imposing LWOP. Because no conviction, including one for special-circumstance murder, is "included in" or "related to" itself, and it obviously is not a "lesser" crime than itself inasmuch as it is elementally identical to itself. But even indulging the playful notion that every crime can be "lesser" than itself, such semantic gimmickry would not alter a court's obligation to observe the commands of section 190.4(e) and Rules of Court, rule 4.421(a)–(c), the import of which is addressed in later sections of this article.
11. *Allen v. Sully-Miller Contracting Company* (2002) 28 Cal.4th 222, 227 ["Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute."].
12. *People v. Rizo* (2000) 22 Cal.4th 681, 685.
13. *Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1387.
14. *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 836, 844.
15. *People v. Loeun* (1997) 17 Cal.4th 1, 9.
16. *Young v. Haines* (1986) 41 Cal.3d 883, 898.
17. *People v. Cunningham* (2015) 61 Cal.4th 609, 669, construing section 190.4(e) and quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 150 [emphasis added]. If a defendant "had not previously been sentenced," the motion to modify the sentence from death to LWOP would ordinarily be heard by the judge who presided at trial. And while that remains the preferred course, *People v. Collins* (2010) 49 Cal.4th 175, 259, the original trial judge is not always available for that purpose. See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 886. But whoever is

tasked with resolving the modification motion, the task itself remains the same. See *People v. Lewis* (2004) 33 Cal.4th 214, 224–226 [noting that the replacement judge had "fully reviewed the transcripts of both the guilt and penalty phases"; held, "when the original trial judge is unavailable, necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record"]; see also *People v. Crew* (2003) 31 Cal.4th 822, 859, citing *People v. Lewis* (1990) 50 Cal.3d 262, 287. By parity of reasoning, any judge other than the trial judge who is put in the position of ruling under section 1172.1 many years after trial must acquire a familiarity with the trial record sufficient to permit "an independent determination concerning the propriety of the death penalty." (*Cunningham*, *supra*, at 669 [emphasis added].)

18. *Payne v. Tennessee* (1991) 501 U.S. 808, 819 [emphasis added].
19. Cal. Const., art. I, § 28(b)(8).
20. *People v. Stringham* (1988) 206 Cal.App.3d 184, 197 [cert. for part. pub.], quoting *Staub v. City of Baxley* (1958) 355 U.S. 313, 320.
21. See *People v. Braggs* (2022) 85 Cal.App.5th 809, 819 [Section 1172.1 ensures that referrals by executive officers receive judicial "'consideration,' meaning by *providing the opportunity* for resentencing.'" (Emphasis in original.)]; *Id*. at 820 ["(T)he sentence ultimately imposed by the court [under section 1172.1] is left to its discretion without any further application of the presumption."]; Couzens, *Recall of Sentence*, *supra*, p. 24 ["(I)n its final analysis the court must determine whether granting the motion for resentencing is in the interests of justice."]
22. *Wheeler v. Superior Court of Los Angeles County* (2024) 15 Cal.5th 1193, 1206 ["Section 1385 broadly 'permits dismissal in the interest of justice in any situation where the Legislature has not clearly evidenced a contrary intent.'"] (*Id*., quoting *People v. Tirado* (2022) 12 Cal.5th 688, 696.)
23. *Wheeler*, *supra*, at 1206–1207.
24. *People v. Superior Court of San Diego County (Romero)* (1996) 13 Cal.4th 497, 530–531, quoting *People v. Orin* (1975) 13 Cal.3d 937, 945.
25. In the non-capital context, the Legislature's prerogative to impose presumptions and less stringent directives in favor of sentencing choices is far less constrained, as those devices implicate none of the constitutional considerations attendant to the uniquely calibrated guidance demanded "on a matter so grave as the determination of whether a human life should be taken or spared." *Gregg v. Georgia* (1976) 428 U.S. 153, 189; see generally *People v. Walker* (2024) 16 Cal.5th 1024 (construing section 1385(c)(2)'s "great weight" clause).
26. *Wheeler*, *supra*, at 1207, quoting *People v. Williams* (1998) 17 Cal.4th 148, 160–161.
27. *Wheeler*, *supra*, at 1207.
28. *Romero*, *supra*, at 530–531 [emphasis added].
29. Cf. generally *Williams*, *supra*, at 159 ["Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses, and other 'individualized considerations."].
30. *People v. Superior Court of Tulare County (Flores)* (1989) 214 Cal.App.3d 127, 144; *Braggs*, *supra*, at 820 ["(A) court would not necessarily impose a lower sentence if the court did not otherwise feel that one was appropriate (unless a change in law from the time of the original sentence mandated a lower sentence) [emphasis in original] quoting, in reference to former section 1170.03, Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1540 (2021–2022 Reg. Sess. as amended Apr. 22, 2021, p. 6).
31. Pen. Code § 1172.1(a)(2).
32. *Gregg*, *supra*, at 206–207 [plurality opinion].